No. 22,782

In the

United States Court of Appeals

For the Ninth Circuit

[redacted]

Appellant,

vs.

[redacted]

Appellees.

On Appeal from the United States District Court
for the District of Nevada

APPELLEES' BRIEF

[redacted]

FILED

[redacted]

Attorneys for Appellees

[redacted]

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No. 22,762

IN THE

United States Court of Appeals

For the Ninth Circuit

SUN VALLEY DISPOSAL CO., INC., a corporation,
Appellant,

vs.

SILVER STATE DISPOSAL CO., CLARK SANITATION, INC., DISPOSAL TRANSPORTATION, INC., HENDERSON DISPOSAL SERVICE, INC., DISPOSAL INVESTMENTS, INC., LESTER L. LaFORTUNE, JOHN ISOLA, and ALFRED ISOLA,
Appellees.

On Appeal from the United States District Court for the District of Nevada

APPELLEES' BRIEF

I

PRELIMINARY STATEMENT

This is an appeal pursuant to 28 U.S.C. Sections 1291 and 1294(1) from the judgment of the District Court for the District of Nevada entered on February 27, 1968. (R. 1091.)* The Honorable Bruce R.

*The Clerk's record is referred to herein as "R." followed by the appropriate page reference.

Thompson granted summary judgment for Appellees in an action instituted under federal antitrust laws. The Memorandum Opinion is attached as Appendix A, infra. (R. 1091a-1099.)

II

STATEMENT OF THE CASE

Appellant Sun Valley Disposal Co., Inc., (Sun Valley) is a Nevada corporation which was engaged in the garbage collection and disposal business in Clark County, Nevada, from approximately January, 1961 to April, 1965. (R. 1121-23 to 1121-24.)

In March, 1965, after a public hearing, the Board of County Commissioners of Clark County awarded a franchise to Appellee Clark Sanitation, Inc. (Clark Sanitation) for the collection of garbage in the unincorporated areas of Clark County. Appellant Sun Valley immediately wrote all customers that it was going to seek an injunction challenging the award of the franchise to Clark Sanitation and that it was continuing to operate in the area encompassed by the franchise for garbage collection despite the action of the Board of County Commissioners. (R. 240.)

On April 4, 1965, a cease and desist order was issued by the District Attorney for Clark County, Nevada, against Appellant Sun Valley to prevent the violation of Clark Sanitation's franchise. Appellant Sun Valley did not attack the franchise and

subsequently discontinued its garbage collection business in Clark County.

On November 19, 1965, Appellant Sun Valley instigated the present litigation by filing a complaint in the United States District Court for Nevada. Thereafter, for over two years, extensive pre-trial discovery was conducted: thirty-four depositions were taken; thousands of documents were produced by the parties and others; four sets of interrogatories were propounded by Appellant Sun Valley and answered by Appellees. The voluminous record now before this Court attests the exhaustive opportunity afforded for discovery.

On June 6, 1966, Appellees moved pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment on the grounds that:

1. The acts complained of were brought about, authorized, sanctioned and approved by an Act of the Legislature of the State of Nevada;

2. The acts complained of did not involve interstate commerce or have an effect on interstate commerce.

After extensive briefing of fact and law, oral argument was heard before Judge Bruce R. Thompson in November, 1967. On February 27, 1968, Appellees' motion was granted and judgment was entered. (R. 1091.) Judge Thompson filed a Memorandum Opinion (R. 1091a-9) with his Order which, after thoroughly discussing the various arguments raised by counsel, held, *inter alia,* that:

a. The franchise caused the extinction of Appellant's garbage disposal business in Clark County and eliminated competition in the performance of such services; (R. 1094, lines 2-6.)

b. The franchise is not attacked and is not claimed to be illegal; (R. 1093, lines 20-21, R. 1094, lines 2-3.)

c. If the franchise for garbage collection was unlawfully granted, the remedy is to attack the franchise; (R. 1098, lines 15-16.)

d. The activity of Appellees in working with or influencing the Board of Commissioners of Clark County was political activity or lobbying which is protected activity under the antitrust laws; (R. 1093, lines 21-23.)

e. Although interstate commerce is incidentally involved, the acts or conduct complained of did not affect the interstate commerce of the garbage collection business. (R. 1098, lines 24-27.)

Appellant Sun Valley had successfully attacked the award of a previous franchise and had threatened to challenge the franchise under which Appellee Clark Sanitation now operates. (R. 1093, lines 28-30 and R. 245.) Although both Appellant Sun Valley and its President, as an individual, had submitted bids for this franchise, they did not want any franchise to be awarded. (R. 4611.) Seven months after the franchise was awarded, this antitrust action was filed.

Appellees adopt the statements of material fact advanced by Appellant Sun Valley in its opening brief. This exhaustive chronicle of events will, therefore, not be re-counted here.

On March 1, 1968, this appeal was taken. On March 4, 1968, Appellant Sun Valley filed a law suit in the Eighth Judicial District of Nevada against Clark Sanitation and certain members of the Board of County Commissioners of Clark County attacking the award of the subject franchise. The complaint in that action is attached as Appendix B, infra.

III

QUESTIONS PRESENTED

1. Did the District Court err in holding that the granting of an exclusive franchise by the Board of County Commissioners of Clark County was a governmental act which is not within the purview of the federal antitrust laws?

2. Did the District Court err in holding that the acts complained of do not involve interstate commerce or have a substantial and direct effect upon interstate commerce?

3. Did the District Court err in holding that if the franchise was unlawfully granted, the remedy is to attack the franchise?

IV

APPELLEES' RESPONSES TO THE SPECIFICATIONS OF ERROR

Appendix C to this Brief consists of a table which specifically refers to the portions of Appellees' argument which are responsive to each of Appellant's assignments of error.

V

SUMMARY OF ARGUMENT

Appellees contend that the granting of an exclusive franchise by the Board of County Commissioners of Clark County was authorized, sanctioned and approved by an Act of the Legislature of the State of Nevada and an Ordinance of Clark County. These governmental acts constitute conduct which is immune from attack under the federal antitrust laws. *Parker v. Brown,* 317 U.S. 338 (1943); *United Mine Workers of America v. Pennington,* 381 U.S. 657 (1965). *Woods Exploration & Prod. Co. v. Aluminum Co. of America,* 284 F. Supp. 582 (S. D. Tex. 1968); Furthermore, as a matter of law, any acts of Appellees in soliciting or inducing the Board of County Commissioners to act in their favor is not within the purview of the Sherman Act. *Eastern Railroad Presidents' Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961); *United States v. Rock-Royal Co-Operative, Inc.,* 307 U.S. 533 (1939); *E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority, et al.,* 362 F. 2d 52 (1st Cir. 1966).

Appellees contend that there was no showing that any line of interstate commerce associated with the garbage collection business was substantially or directly affected by any acts or conduct of the parties. Although Appellant and Appellees were involved in various lines of interstate commerce, the test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct affects the interstate commerce of such business. *(Page v. Work*, 290 F. 2d 323 (9th Cir. 1961), *cert. denied*, 368 U.S. 875 (1962); *Las Vegas Plumbers Association v. United States*, 210 F. 2d 732 (9th Cir. 1954), *cert. denied*, 348 U.S. 817 (1955).

Appellees contend if the franchise granted by the Board of County Commissioners is invalid, Appellant's remedy is to attack such franchise. If the awarding of the franchise by the Board of County Commissioners in 1965 was a valid governmental act, the doctrine of immunity is applicable. If the franchise awarded pursuant to state enabling legislation and county ordinance is invalid, it must be attacked in the appropriate state court with jurisdiction over the parties. Appellant Sun Valley has recently made such an attack. *(Okefenokee Rural Electric Membership Corporation v. Florida Power and Light et al.*, 214 F. 2d 413 (5th Cir. 1954); *Public Service Commission of Utah v. Wycoff Company, Inc.*, 344 U.S. 237 (1952); *Tomiyasu v. Golden*, 358 F. 2d 651 (9th Cir. 1966).

When confronted by a motion for summary judgment, Appellant is not permitted to rest upon the

allegations of its pleadings, but is required to set forth specific facts showing that there is a genuine issue for trial. This has not been done, despite full discovery, because it cannot be done. Appellees take issue with none of the facts set forth in Appellant's opening brief. Summary judgment was properly granted to avoid a prolonged and expensive trial. (*First National Bank of Arizona v. Cities Service Co.,* 88 S. Ct. 1575 (1968)).

VI

ARGUMENT

A. THE DISTRICT COURT DID NOT ERR IN HOLDING THAT THE GRANTING OF AN EXCLUSIVE FRANCHISE BY THE BOARD OF COUNTY COMMISSIONERS OF CLARK COUNTY WAS A GOVERNMENTAL ACT WHICH IS NOT WITHIN THE PURVIEW OF THE FEDERAL ANTITRUST LAWS. (Response to Appellant's Assignment of Error Nos. 4, 5 and 8.)

1. Nevada Enabling Legislation Authorized The Granting Of The Franchise.

The District Court held that it was the granting of the franchise which resulted in "the extinction of [Appellant's] garbage disposal business in Clark County and eliminated competition in performance of such services." (R. 1094.) It was only after the award of the franchise and the issuance of a cease and desist order by the District Attorney that Appellant Sun Valley discontinued its garbage collection business. The gravamen of Appellant Sun Valley's complaint is that this franchise should never have been awarded. As stated in Appellant's brief,

R. J. Collet, President of Appellant Sun Valley, testified on deposition:

> "I don't think that that is what my case is all about. I think that I am approaching this from the standpoint that there was a situation created that brought about the invitation for a franchise and what not. This is my objection to the method that the franchise was actually originated. The entire situation from the inception of the—even the thought of granting the franchise in the County. I don't think that I have got any real quarrel with the County Commissioners. I am not quarrelling with them. I am saying that my competitor created the situation." (R. 4611.)

Appellant Sun Valley has not attacked the award of the franchise in this action although it had threatened to do so. Nor has Appellant attacked the validity of the enabling legislation authorizing such franchise. (R. 1093.)

The relevant Nevada State statute is N.R.S. 244.183 which states in material part:

> "*Franchises for garbage collection and disposal service*"
>
> 1. Any Board of County Commissioners may grant exclusive franchises to operate garbage collection and disposal services outside the limits of incorporated cities within the County.
>
> 2. The Board of County Commissioners may, by ordinance, regulate such services and fix fees or rates to be charged by the franchise holder.
>
> 3. A notice of the intention to grant any franchise shall be published once in a newspaper

> of general circulation in the County, and the franchise may not be granted until 30 days after such publication. The Board of County Commissioners shall give full consideration to any application or bid to supply such services, if received prior to the expiration of such 30-day period, and shall grant the franchise on terms most advantageous to the County and the persons to be served."

Clark County Ordinance No. 214 was passed in 1964 by the Board of County Commissioners of Clark County pursuant to this enabling statute. (R. 228-234.) The applicability of this legislation to the award of the franchise involved in this litigation is apparent. That such activity by the Board of County Commissioners or Appellees in seeking the award of such franchise is conduct immune from the federal antitrust laws is also apparent from a brief review of the leading cases.

2. The Granting Of The Franchise Was Conduct Immune From Attack Under The Sherman Act.

In the landmark case of *Parker v. Brown,* 317 U.S. 341 (1943), a raisin producer brought suit to enjoin the State Director of Agriculture, the members of the State Agricultural Prorate Advisory Commission, and others charged by the statute with the administration of the Prorate Act, from enforcing a program for marketing raisins in California. Plaintiff contended, *inter alia,* that the order was illegal because it violated Sections 1 and 2 of the Sherman Act. (U.S.C.

Sections 1, 2.) The Supreme Court held that when the acts complained of are the result of a state act, or legislative fiat, the Sherman Act does not apply so long as the federal government has not pre-empted the field to itself. The Court found nothing in the language of the Sherman Act or in its history which suggested that its purpose was to restrain such conduct. The Court upheld the activity of the officials because upon a consideration of all the relevant facts and circumstances, it appeared that the matter was one which might be appropriately "regulated in the interest of the safety, health, and well-being of local communities," and which, because of its local character and practical difficulties, might never be adequately dealt with by Congress. (*Id.* at p. 362.)

In Clark County, Nevada, the matter which was appropriately regulated in the interest of the safety, health and well-being of the local community was the service of garbage collection and disposal. The Board of County Commissioners as duly elected officials of Clark County were officers or agents of the State. The activity of inviting bids and awarding exclusive franchises was specifically authorized by N.R.S. 244.183, *supra*.

A decision cited by Appellant Sun Valley as authority for its position has subsequently been modified to grant summary judgment in an antitrust action on the same issues as are here involved. In finding for defendants in *Woods Exploration & Prod. Co. v. Aluminum Co. of America*, 284 F. Supp. 582 (S.D. Tex. 1968), the District Court gives a lucid summary

of the *Parker v. Brown* doctrine *supra*. Plaintiffs and defendants were engaged in the production and marketing of natural gas from the Appling Gas Field in Texas. Plaintiffs sought to recover as damages the loss of production from their wells in the field which had been occasioned by the entry of orders by the Texas Railroad Commission, setting production allowables for plaintiffs' wells at levels lower than plaintiffs thought they should have received. Plaintiffs sought to hold defendants liable for this loss on the ground that the Railroad Commission orders had been based, at least in part, on false forecasts and reports filed by defendants with the Commission. By amended complaint, plaintiffs specified various other activities by defendants, taken pursuant to the alleged conspiracy.

After reviewing the numerous depositions, documents and papers on file in the case, the Court held that although there were disputed issues of fact on whether defendants actually conspired together and whether they deliberately filed the false forecasts or brought about litigation as part of a conspiracy, plaintiffs would still not be entitled to recover antitrust damages for these activities even if proved. The Court held:

> "The mere manipulation of labels does not determine the outcome of this case, for as made clear by other cases, liability is precluded if the restraint complained of results from otherwise valid governmental action even though brought about by the improper conduct of a private party." (*Id.* at p. 591.)

The Court observed that states have been free to regulate industries within their boundaries by curtailing competition or eliminating it altogether. *Asheville Tobacco Board of Trade, Inc. v. FTC*, 263 F. 2d 502 (4th Cir. 1959). The Court then compared the facts with those in *Okefenokee Rural Elec. Membership Corp. v. Florida Power & Light*, 214 F. 2d 413 (5th Cir. 1954), and the Court agreed with the statement by Judge Biggs therein that:

> "'Implicit in [the Okefenokee] ruling is the legal conclusion that liability under the Sherman Act cannot be sustained by virtue of official action of a State agency, *however inspired by the acts of an individual*.' *Eastern Railroad President's Conf. v. Noerr Motor Freight, Inc.*, 273 F. 2d 218, 226 (3rd Cir. 1959) (dissenting opinion) (Emphasis Added.) Moreover, there are two crucial similarities between the two cases. In both, the injury complained of resulted directly from specific action taken by a state administrative agency on the basis of false information provided by private parties. Secondly, just as certainly as the plaintiff in *Okefenokee* had no legal right to use a particular route for the construction of a power line without the consent of the State of Florida, the plaintiffs here have no legal right to produce an amount of gas in excess of the specific allowable assigned to them by the State of Texas acting through the Railroad Commission. See Tex. Rev. Civ. Stat. Ann. art. 6008, Section 16 (1964)." (284 F. Supp. at p. 592.)

The same two crucial similarities are present in this case: the injury complained of by Appellant Sun Valley resulted directly from the action taken by the

Board of County Commissioners and Appellant Sun Valley has no legal right to engage in the garbage collection and disposal business in Clark County without an approved franchise.

In the *Woods* case, the Court concluded that the filing of false forecasts was a violation of state penal law and would support a cause of action under the state's statutory and common law. As suggested by Judge Thompson in the instant case, and as stated in the holding of the District Court in Texas:

> "Simply by veiling their grievance under the penumbra of a conspiracy charge, however, plaintiffs cannot convert what are in essence only violations of state law and what is primarily a matter of state concern into a federal antitrust violation." *(Id.* at p. 594, citations omitted.)

3. The Seeking Of The Franchise Was Conduct Immune From Attack Under The Sherman Act.

The *Parker v. Brown* doctrine that governmental acts are immune from the antitrust laws was expressly reaffirmed in *Eastern Railroad President's Conf. v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961). A group of trucking companies and their trade association brought suit against a group of railroads, a railroad association, and a public relations firm, alleging that the defendants had conspired to restrain trade in, and monopolize, long distance freight, in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. Sections 1, 2). More specifically, it was alleged that the railroads had hired the public relations firm, *inter alia,* to foster adoption and retention of laws and law enforcement practices destruc-

tive of the trucking business, and that the defendants had succeeded in persuading the Governor of Pennsylvania to veto a measure known as the "Fair Truck Bill". The District Court and the Court of Appeals allowed recovery and defendants petitioned for *certiorari*, limiting the question of the correctness of the judgment to violation of the Sherman Act.

In reversing the lower courts, Justice Black said:

> "It has been recognized, at least since the landmark decision of this Court in *Standard Oil Co. of New Jersey v. United States*, that the Sherman Act forbids only those trade restraints and monopolizations that are created or attempted, by the acts of 'individuals or combinations of individuals or corporations'. Accordingly, it has been held that where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out. These decisions rest upon the fact that under our kind of government the question whether a law of that kind should pass, or if passed be enforced, is the responsibility of the appropriate legislative or executive branch of government so long as the law itself does not violate some provision of the Constitution." (*Id.* at pp. 135-136.)

Recently, the immunity of governmental acts was applied to an exclusive franchise situation similar to that now before the Court in *E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority, et al.*, 362 F. 2d 52 (1st Cir. 1966). The Massachusetts Port Authority awarded a fixed base operation at the Logan International Airport to one aviation company to the exclusion of the plaintiff. A fixed base operation

is one that provides facilities, fuel, equipment, supplies, freight handling, and related services which are used by aircraft, crews, and passengers. (*Id.* at p. 53, n. 2.)

The plaintiff aviation company brought an action against the port authority, the aviation company receiving the award, and a subsidiary of the aviation company. The complaint alleged that the defendants entered into a "conspiracy, combination, or contract in restraint of trade or commerce" to establish a sole and exclusive fixed base operation at Logan Airport in violation of Section 1 of the Sherman Act and that each of them attempted to monopolize and combined and conspired to monopolize said business or operation in violation of Section 2 of the Sherman Act. (*Id.* at p. 53.) Plaintiff claimed injury in that it was forced to sell its business and equipment at Logan Airport at a very low price.

The District Court dismissed the suit on the ground that the complaint failed to state a claim upon which relief could be granted. The First Circuit Court of Appeals affirmed. Directing its attention to the conduct of the defendant aviation company and subsidiary, the Court concluded:

> *"If, as we have found, the Authority's conduct was lawful here it would be an unreasonable restriction on its freedom to hold that the other defendants acted illegally in having aided it."* (*Id.* at p. 56, emphasis added.)

There was no intent at the time of enactment of the Sherman Act, nor is there any authority expressed by

the courts today to regulate governmental acts under the antitrust laws. The purpose of the antitrust laws is the protection of the public. This purpose is equally served by a government acting pursuant to valid legislative authority. And where a government does so act, it is an "unreasonable restriction on its freedom to hold . . . other(s) . . . acted illegally in having aided it."

It is clear from the foregoing authorities that the award of the franchise is immune from the antitrust laws. That the seeking of such a franchise or the combination with others for this purpose is not violative of the Sherman Act is also established law. As the Supreme Court pointed out in *Noerr, supra:*

> "We think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular actions with respect to a law that would produce a restraint or monopoly." (365 U.S. at 136.)

To hold otherwise, the opinion points out "would impute to the Sherman Act a purpose to regulate, not business activity, but political activity." (*Id.* at p. 137.) Relying on *Parker v. Brown, supra,* the Court stated that there is no basis in the legislative history of the Act to impute such a purpose and such a construction would raise important constitutional questions:

> *"The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to*

invade these freedoms." (*Id.* at p. 138, emphasis added.)

Respondents in *Noerr, supra,* relied upon a finding of the District Court that the railroad's sole purpose in seeking to influence the passage and enforcement of laws was to destroy the truckers as competitors for the long-distance freight business. The Supreme Court held that this purpose did not transform lawful acts into a violation of the Sherman Act:

> "It is neither unusual or illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors." (*Id.* at p. 139.)

The Court further noted that it had expressly recognized this fact in *United States v. Rock-Royal Co-operative, Inc.,* 307 U.S. 533 (1939), where it stated:

> "If ulterior motives of corporate aggrandizement stimulated their activities, these efforts were not thereby rendered unlawful. If the Act and Order are otherwise valid, the fact that their effect would be to give co-operatives a monopoly of the market would not violate the Sherman Act. . ." (*Id.* at p. 560.)

The extended scope of immunity from antitrust laws was affirmed by the United States Supreme Court in *United Mine Workers of America v. Pennington,* 381 U.S. 657 (1965). In that case, the union sued partners of a coal mining company for royalty payments under an agreement. Defendants counterclaimed, alleging that the United Mine Workers (UMW) had violated the Sherman Act by conspiring with the large

coal producers to eliminate small producers. Evidence was introduced of a concerted effort by the UMW and the large producers to influence the Secretary of Labor to set a minimum wage in the industry so high as to drive out small producers. There was evidence that such a minimum wage had been set by the Secretary of Labor. Evidence was also introduced that defendants had successfully conspired to prevail on T.V.A. officials to purchase coal only from the large producers. After a verdict against the United Mine Workers, the UMW moved for a new trial on grounds that the above evidence had been improperly admitted. The Court of Appeals affirmed the trial Court's denial of the motion for a new trial, but the Supreme Court reversed and remanded. The Court said, at page 670:

> "*Noerr* (*Eastern Railroads President's Conf. v. Noerr Motor Freight, Inc.*, page 13, *supra*), shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose. . . . *Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act.* The jury *should have been so instructed* and, given the obvious telling nature of the evidence, we cannot hold this lapse to be mere harmless error." (Emphasis added.)

This line of cases quite clearly denies any violation of the antitrust laws resulting from "governmental action" whether state or local and "efforts to influence

public officials". (*Parker v. Brown* and *Noerr, supra.*) And no damages suffered thereby are recoverable under the Sherman Act. (*Pennington, supra.*)

Appellant Sun Valley does not dispute the authority of these cases or the conclusiveness of this defense. Appellant's careful avoidance of any discussion or citation of the immunity doctrine is not the result of inattention. It is remarkable that the Supreme Court's holdings argued by Appellees in the lower Court and adopted by Judge Thompson in his Opinion are not mentioned by Appellant Sun Valley for consideration by this Court.

This Court may affirm summary judgment without consideration of the other bases of the lower Court's decision. The doctrine of immunity and the constitutional reasons therefor merit the conclusion of this action without further delay and expense.

B. THE DISTRICT COURT DID NOT ERR IN HOLDING THAT THERE WAS NO SHOWING THAT ANY LINE OF INTERSTATE COMMERCE ASSOCIATED WITH THE GARBAGE COLLECTION BUSINESS WAS SUBSTANTIALLY OR DIRECTLY AFFECTED BY ANY ACTS OR CONDUCT OF THE PARTIES. (Response to Appellant's Assignment of Error, Nos. 1-3.)

It is fundamental that in order to sustain a civil antitrust action under the Sherman Act, it must be established that the acts complained of involve interstate commerce or, if intrastate in nature, that they have a substantial and direct effect on interstate commerce. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948); *Las Vegas Merchant Plumbers Association v. United States*, 210

F. 2d 732 (9th Cir. 1954), *cert. denied*, 348 U.S. 817 (1955); *David Cabrera, Inc. v. Union de Choferes y Duenos de Camiones Hermandos de Puerto*, 256 F. Supp. 839 (D.P.R. 1966). Two separate tests of interstate commerce have emerged from the growing body of federal antitrust law on this subject. A clear statement of these tests, their conceptual differences, and the analytical approach to be followed in applying them is found in *Las Vegas Merchant Plumbers Association v. United States, supra:*

> "A case under the antitrust laws, so far as the interstate commerce element is concerned may rest on one or both of two theories:
>
> (1) That the acts complained of, occurred within the flow of interstate commerce. This is generally referred to as the 'in commerce' theory.
>
> (2) That the acts complained of, occurred wholly on the state or local level, in intra-state commerce, but substantially *affected* interstate commerce.
>
> Under both of these theories, the transactions complained of must *affect or have an effect* on interstate commerce or the requirements of the statute are not satisfied." (210 F. 2d at pp. 739-740, n. 3, emphasis by the Court.)

It will be noted that under either test, the essential element of first analysis is "the acts complained of". A close reading of the amended complaint and affidavits and a review of the facts established during discovery reveals nothing more than the *intra*state competitive activities of several local garbage and refuse collectors, all of whom are located in, and conduct

business solely in, the geographical area surrounding Las Vegas, Nevada. Nevertheless, Appellant Sun Valley has, through a sophistry of words and legal conceptualizations, attempted to dress up these essentially intrastate activities in interstate garb to meet the jurisdictional requirements of the Sherman Act. This attempt fails for the reasons set forth below:

1. The Acts Complained Of Did Not Occur In Interstate Commerce.

The guidelines for the "in commerce" test of jurisdiction were further delineated in *Page v. Work,* 290 F. 2d 323 (9th Cir. 1961), *cert. denied,* 368 U.S. 875 (1962). The case came before the Court on appeal from the District Court's dismissal of the action by granting defendants' motion for summary judgment for lack of jurisdiction. Appellant's main contention was that the trial Court committed error in finding that the product involved was not in the flow of interstate commerce. It was their position that the business of printing and publishing newspapers is interstate because newsprint, ink, other supplies, news items, and advertisements are received from outside California. The Ninth Circuit Court of Appeals agreed that plaintiff and defendants were engaged in interstate commerce by virtue of:

(1) Their regular purchases of newsprint and other supplies from sources outside of California;

(2) The dissemination of national news;

(3) Their carrying of national advertising;

(4) A few out-of-state subscribers.

However, this was not determinative of the issue of interstate commerce:

> "The test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business." (290 F. 2d at 330.)

The commerce issue in *Page v. Work* was identical to that in the case at bar. Appellees, various newspapers in the City and County of Los Angeles, caused the formation of the Los Angeles Newspaper Service Bureau ("Bureau"), a California corporation. Each of the defendant newspapers individually used the services of the Bureau for the solicitation of private and public legal advertising. The Bureau assisted newspapers in soliciting lawyers, title companies, escrow departments, court commissioners, and others who published legal notices in the local newspapers. As a result of such joint operation, and other activities of the Bureau, it was charged that the business of the Los Angeles Journal became so impaired that it was sold at a distressed price and the assets were purchased by a subsidiary corporation of the Bureau.

An action was brought by a stockholder of the Los Angeles Journal under Sections 1 and 2 of the Sherman Act. (15 U.S.C., Sections 1, 2.) After extensive pretrial discovery, a motion for summary judgment was granted on the jurisdiction issue because no effect was shown on any part of the trade or commerce among the several states.

In setting forth the method by which it arrived at its conclusion, the Court stated:

> "Appellant's view of the flow of commerce relates to the newspaper business as a whole rather than the *relevant market* with which we are concerned, which is separate and divisible from other markets in which a newspaper may be engaged. In the antitrust field, a *relevant market* may be narrower than the entire business under scrutiny." (*Ibid.*, emphasis added.)

The Court then held that the product involved was legal advertising in newspapers printed, published, and circulated in Los Angeles County; the revelant geographical market in which the parties competed was Los Angeles County.

In applying the test of *Page v. Work* to the facts now before the Court, it is apparent that the same result should be reached. Here, as in *Page v. Work,* the product involved was a service, to wit, the service of garbage collection and disposal. This was the only service which Appellant Sun Valley provided and the sole business for which it was licensed to operate. This was the only service provided by Appellee Clark Sanitation in competition with Appellant Sun Valley. Garbage collection and disposal service was, therefore, the sole product in which there was any competition with Appellant Sun Valley, and from which any restraint on commerce could arise.

The relevant geographic market in which the parties provided the service of collecting and disposing of garbage was Clark County. Appellant Sun Valley operated its garbage collection and disposal service

only in Clark County. Appellee Clark Sanitation operated its garbage collection and disposal service only in Clark County. Finally, garbage collection and disposal is limited by the relevant Nevada statute (N.R.S. 244.183, p. 27, *supra*) to the geographical area over which the governmental authority granting the franchise has jurisdiction. That area was the unincorporated area of Clark County.

From the above it is clear that, as with the publication of legal notices in Los Angeles County in *Page v. Work*, *supra*, the line of commerce in the case at bar upon which any restraint is or could be alleged is *intrastate*, i.e., garbage collection and disposal services in the unincorporated area of Clark County.

2. The Acts Complained Of Have Not Affected Nor Had An Effect On Interstate Commerce.

(a) The Container Theory.

Appellant Sun Valley infers that Appellees affect interstate commerce because the corporations have purchased some equipment that is manufactured out of state. It is submitted that this theory reduces the concept of interstate commerce to an absurdity. Nevada is not a heavily industrialized state. It is therefore understandable that most businesses depend to some extent upon imported manufactured goods. Does it then follow that all of these businesses suddenly affect commerce between the several states within the meaning of the Sherman Act?

Appellant Sun Valley goes to great lengths in the amended complaint and affidavits to describe the amounts of equipment which have been supplied to the

parties from out-of-state sources. The description includes the dollar volume of items purchased and the amount of income derived by the parties from these products. For the purposes of this Brief, Appellees do not dispute these figures, but ask only for any indication that the trade or commerce in these goods has been affected. Appellant Sun Valley does not allege that it was restrained in its efforts to obtain containers, that the Appellees were able to effect the prices charged for these containers, or that there was a division of market for containers. Similarly, there are no factual allegations as to any competition between the parties or any effect on commerce from other materials used in the performance of garbage collection and disposal services such as garbage trucks, tires, replacement parts, and office supplies.

Futile attempts to satisfy the interstate commerce requirement by oblique references to products made out-of-state are recorded in numerous decisions. The decision in *Lieberthal v. North Country Lanes, Inc.*, 332 F. 2d 269 (2d Cir. 1964), is squarely on point and illustrates a common sense application of the tests of interstate commerce in an antitrust action. The plaintiff alleged, *inter alia*, that defendants conspired to prevent him from opening up a bowling alley in competition with one of the defendants' bowling alleys. The complaint touched numerous bases in the field of interstate commerce including the following:

(1) Competition with out-of-state bowling alleys;

(2) The solicitation of out-of-state patronage by news and other media;

(3) A substantial flow of kitchen, service, and bowling equipment and merchandise to be sold at the bowling alley.

The District Judge dismissed the complaint because the averments were insufficient to show any restraint of *inter*state as opposed to *intra*state commerce. The Court of Appeals agreed:

> "A business of which the ultimate object is the operation of intrastate activities . . . may make such a substantial utilization of the channels of interstate trade and commerce that the business itself assumes an interstate character. . . . *It has frequently been held, however, that the incidental flow of supplies in interstate commerce*, . . . the interstate travel of customers of the local enterprise, . . . the solicitation of business in other states for the local enterprise, . . . the utilization of interstate communications media, . . . or a location in an area of interstate activity, . . . *do not in themselves suffice to transform an essentially intrastate activity into an interstate enterprise.*" (*Id.* at p. 271, citations omitted, emphasis added.)

The Court then noted the general rules that the Sherman Act condemns wholly local business restraints that affect interstate commerce as well as restraints in interstate commerce, but observed that:

> ". . . *the effect of the local restraints on interstate commerce must be 'direct and substantial,*

and not merely inconsequential, remote or fortuitous'." (*Id.* at 272, emphasis added.)

A common sense application of this test led the Court to conclude that the restraints alleged—the stoppage of the flow of bowling alley equipment and materials from outside the state—constituted a far cry from the required substantial effect on interstate commerce.

Variations on the *Lieberthal* theme are in abundance. *In Monument Bowl, Inc., v. Northern California Bowling Proprietor Association,* 197 F. Supp. 208 (1961), *rev'd on other grounds,* 316 F. 2d 787 (1963), the plaintiff operated a bowling alley in South San Francisco. Defendants were other bowling alleys, their proprietors, and five trade associations. Plaintiff alleged defendants violated the Sherman Act by establishing minimum prices and by boycotting his business (since his patrons were ineligible to compete in tournaments conducted by members of defendant associations). Intrastate commerce was said to be affected by the flow of bowling equipment, bags, shoes, etc., and the existence of an interstate network of tournaments. The District Judge granted a motion to dismiss the complaint on the basis that the acts complained of were purely *intra*state and had no appreciable effect on interstate commerce:

> "Yet it is the consumer, the bowler and his patronage, with whom we are concerned and whose patronage gives rise to the *relevant market.* A charge dealing with loss of customers, in the manner set forth above, does not pertain to a

violation of Section 1 of the Sherman Act. Rather, at most, it deals with local restraint which affects local commerce.

"It is not enough to allege that plaintiff's order for equipment will decline by reason of defendants' competition which takes away a percentage of bowling customers. Such allegation is too remote from the flow of interstate commerce to bring into application plaintiff's authorities." (197 F. Supp. at 210, emphasis added.)

In *Spears Free Clinic and Hospital v. Cleere*, 197 F. 2d 125 (10th Cir. 1952), plaintiffs alleged a conspiracy on behalf of numerous defendants to restrain them from obtaining a license and practicing chiropractics in the State of Colorado. The Court of Appeals affirmed the lower court's decision in dismissing the complaint on the ground that the effect upon interstate and foreign commerce was "fortuitous and remote and not direct and substantial". The Court stated:

"A curtailment of the manufacture of articles to be shipped in interstate commerce or the lessening of the number of persons who travel in interstate commerce resulting from a conspiracy to restrain or monopolize a wholly local activity *is ordinarily* an incidental, indirect and remote obstruction to *such commerce*." (*Id.* at 127, emphasis added.)

"Here the purpose and object of the conspiracy and the means adopted to effectuate it were to restrain the practice of chiropractic and to allocate to the medical profession the practice of the healing arts in Colorado. *It is this exclusively local*

> *aim and not the fortuitous and incidental effect upon interstate and foreign commerce which gives character to the conspiracy.* The effect upon interstate and foreign commerce was fortuitous and remote and not direct and substantial." (*Id.* at 128, emphasis added.)

Finally, the receipt of materials and equipment from out-of-state suppliers was also rejected as fulfilling the commerce requirement in *Marks Food Corporation v. Barbara Ann Baking Co.,* 162 F. Supp. 300 (S.D. Calif. 1958), *rev'd on other grounds,* 274 F. 2d 934 (9th Cir. 1960). Plaintiffs established that defendants purchased (outside the state) a substantial portion of the flour and machinery used in the making of bread and that these materials were shipped into California across state lines by the defendants. (162 F. Supp. at 302.) But the Court held that defendant's business was neither in nor directly affected trade and commerce among the several states. As the Court remarked:

> "If plaintiff's theory in the case at bar were adopted, then any group . . . who purchased raw materials and machinery outside the state . . . could be amenable to the antitrust laws." (*Id.* at 304.)

Appellant's container theory is apparently predicated on the fact that fewer of these items will move in interstate commerce because of Appellees' alleged restraint on the purely intrastate garbage collection and disposal service. The rationale found in the *Lieberthal, Spears Free Clinic, Monument Bowl,* and

Marks Food cases, cited above, clearly demonstrate the infirmity of this theory as a basis for transmuting an essentially intrastate business into an interstate enterprise. Appellees respectfully contend that a common sense application of the principles enunciated in those cases to the facts in the case at bar, leads to the inescapable conclusion that any effect on interstate commerce arising out of the sporadic movement of such items into Nevada is clearly incidental, remote, fortuitous, speculative, and inconsequential.

(b) The Page, Arizona, Theory.

Appellant's final attempt to meet the jurisdictional requirements of the federal antitrust laws is predicated on the fact that Appellee Henderson Disposal Service, Inc. (Henderson Disposal) operated a garbage collection and disposal service in Page, Arizona, prior to 1964. The sole purpose in joining Henderson Disposal in this action was to remedy the jurisdictional defects. But as previously noted, Henderson Disposal is an independent company engaged in its own garbage collection and disposal service. It does not share common yard or office facilities, pickup territories, dump sites, or equipment rental arrangements with any of the other Appellees. And, it has never been in competition with Appellant Sun Valley in Clark County.

The same jurisdictional ploy was attempted by an unsuccessful plaintiff in *C. A. Page Publishing Co. v. Work*, 290 F. 2d 334 (9th Cir. 1961)—a companion case to *Page v. Work, supra*. In order to meet the interstate commerce requirement, the plaintiff-appel-

lant claimed that the same conspiracy alleged in *Page v. Work, supra,* included a restraint on the dissemination of national news through the City News Service, a news gathering agency at one time operated by one of the defendants. The Court summarily rejected this attempt to establish jurisdiction:

> "We see no relation between the operation of City News Service and the competition between appellees and Commercial News (appellants) for public legal advertising, and thus the interstate character of City News Service is *entirely irrelevant to jurisdictional issues here presented.*" (*C.A. Page Publishing Co. v. Work*, 290 F. 2d 334, 337 (1961), emphasis added.)

Similarly, there is no relation between the operation of garbage collection and disposal service in Page, Arizona, and the competition between Appellant Sun Valley and Appellee Clark Sanitation in Clark County. And thus any interstate character of business of Henderson Disposal is entirely irrelevant to the jurisdictional issues in this case.

There is additionally no factual allegation of any effect upon the commerce in Page, Arizona. Nothing has been raised by the exhaustive discovery to indicate any restraint on this service. Jurisdiction under the federal antitrust laws is not established because of a failure to show specific facts indicating a relationship between the acts complained of and a line of interstate commerce involved in this lawsuit.

C. THE DISTRICT COURT DID NOT ERR IN HOLDING THAT IF THE FRANCHISE AWARD WAS ILLEGAL, THE REMEDY IS TO ATTACK THE FRANCHISE. (Response to Appellant's Assignment of Error, Nos. 6 and 7.)

The District Court has held that if the franchise award which is the basis of this action was illegal, the remedy is to attack the franchise. (R. 1098.) This decision should not have surprised Appellant Sun Valley. In 1963, it obtained an order preventing Clark Sanitation from operating the franchise because publication of notice to bid had been faulty. (R. 1121-250.) In 1965, it threatened a similar attack on the franchise now involved. In March, 1968, it brought such attack in the District Court of the State of Nevada. (Appendix B.) Had not Appellant been so wistfully pursuing what Judge Thompson termed the "Golden Fleece" of treble damages, the jurisdiction of a state court might have been earlier sought.

For whatever reasons Appellant did not directly challenge the franchise award before, it cannot indirectly do so now under the guise of an alleged antitrust violation. The impropriety of collaterally attacking the actions of County Commissioners in a federal antitrust suit was affirmed in *Okefenokee Rural Electric Membership Corporation v. Florida Power & Light, et al.*, 214 F. 2d 413 (5th Cir. 1954). The Circuit Court of Appeals upheld the dismissal of the complaint because:

> "The injury complained of by Okefenokee being the refusal of the State Road Department to grant it a permit to run its line down a state

> highway, and the adoption by the Duval County Commissioners of regulations invading its legal rights, the actions of those administrative bodies could not afford Okefenokee any right of action under the Antitrust Acts, since the orders complained of were the sole responsibility of the administrative boards, and the subject matter was exclusively within their jurisdiction; the validity of those orders could be attacked only in an action of mandamus or other such remedy in the state court and may not be collaterally attacked in this proceeding." (*Id.* at 417, n. 4.)

In *TV Pix, Inc. v. Allard, et al.,* and *Wells TV, Inc. v. Allard, et al.* (Memorandum Opinion of the United States District Court for the District of Nevada filed December 16, 1966), complaints were filed in the federal district court seeking preliminary and final injunctions prohibiting defendant members of the Public Service Commission of the State of Nevada from investigating, taking jurisdiction, or imposing any regulation pursuant to N.R.S., 704, *et seq.* After discussing two lines of Supreme Court authority for denying jurisdiction, the three-judge Court held:

> "There is an adequate procedure in the state courts to have these questions decided. If the defendants determine that the plaintiffs are within the purview of NRS 704.020 (d) they will then issue an order requiring the plaintiffs to cease and desist operations until a certificate of public convenience and necessity is issued. NRS 704.330 (4). The plaintiffs may then bring an action in the state district court to have the order of the

Commission vacated or set aside. NRS 704.540. An appeal is available from a decision in the state district court to the Supreme Court of the State of Nevada. NRS 704.580. Since it is possible that the interpretation given by the state courts may be dispositive of the case, this Court will abstain from exercising jurisdiction.

"The federal courts will also adopt a hands-off policy when the problem involves the administration by the state of its own affairs. Where state administrative action is challenged, the federal court will normally not intervene when there is an adequate state review procedure for the protection of federal rights. *Burford v. Sun Oil Co.*, 319 U.S. 315; *Alabama Public Service Comm. v. Southern Railway Co.*, 341 U.S. 341. The Courts will not meddle in a state's administrative affairs. See also: *Audio-casting, Inc. v. State of Louisiana*, 143 F. Supp. 922." (Memorandum Opinion at p. 6.)

The three-judge Court found particularly persuasive the language of Justice Jackson in *Public Service Commission of Utah v. Wycoff Company, Inc.*, 344 U.S. 237 (1952). In ordering the dismissal of a suit seeking declaratory judgment and an injunction restraining the state public service commission, the Supreme Court said:

> "*State administrative bodies have the initial right to reduce the general policies of state regulatory statutes into concrete orders and the primary right to take evidence and make findings of fact.* It is the state courts which have the first and last word as to the meaning of state statutes and whether a particular order is within the legisla-

tive terms of reference so as to make it the action of the State. We have disapproved anticipatory declarations as to state regulatory statutes, even where the case originated in and was entertained by courts of the State affected. *Alabama State Federation of Labor v. McAdory,* 325 U.S. 450. Anticipatory judgment by a federal court to frustrate action by a state agency is even less tolerable to our federalism. Is the declaration contemplated here to be res judicata, so that the Commission cannot hear evidence and decide any matter for itself? If so, the federal court has virtually lifted the case out of the State Commission before it could be heard. If not, the federal judgment serves no useful purpose as a final determination of rights." (344 U.S. at 246-7, emphasis added.) Cf. *Burford v. Sun Oil Co.,* 319 U.S. 315 (1942); *Tomiyasu v. Golden,* 358 F. 2d 651 (9th Cir. 1966).

In order for Appellant Sun Valley's collateral attack on the franchise to affect the defense of the immunity of governmental acts and the immunity of joint effort to obtain such acts, the jury would have to be instructed that it could find the award of the franchise void under Nevada law. The idea of a federal jury deciding the propriety of county franchises in a suit brought under Section 4 of the Sherman Act is as novel as it is unsound. The District Court did not abuse its discretion in requiring Appellant to seek a state remedy. The District Court did not abuse its discretion in granting summary judgment.

Summary judgment has been one of the keystones of modern federal practice. Where, as here, there is

no genuine issue of material fact, this procedural tool is necessary to avoid a prolonged and expensive trial. The validity of summary judgment was most recently attested in *First National Bank of Arizona v. Cities Service Co.*, 88 S.Ct. 1575 (1968). This was a treble damage antitrust action brought against seven large oil companies alleging the formation and maintenance of a world-wide oil cartel and a conspiracy claimed to have been entered into at the time of the nationalization of the properties of the Anglo-Iranian Oil Company by the government of Iran in May, 1951. In affirming summary judgment for Defendant Cities Service Co., the Supreme Court said:

> "While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint." (*Id.* at p. 1593.)

The Court emphasized that where extensive pretrial discovery has failed to produce probative evidence to support the allegations of the pleadings, the increased efficiency of summary judgment procedures under the amended Rule 56 of the Federal Rules of Civil Procedure should be invoked.

VII

CONCLUSION

There is no genuine issue of fact for trial and judgment is properly entered. Appellees respectfully submit that this Court should affirm the judgment of the District Court.

Dated, San Francisco, California,
September 16, 1968.

JOSEPH L. ALIOTO,
FREDERICK P. FURTH,
THOMAS A. FOLEY,
RICHARD H. HICKS,
JON N. RICHARDSON,
By FREDERICK P. FURTH,
Attorneys for Appellees.

(Appendices A, B and C Follow)

Appendix A

In the United States District Court
for the District of Nevada.

Civil No. 847

Sun Valley Disposal Co., Inc., a corporation,
Plaintiff,
vs.
Silver State Disposal Company, a corporation, et al.,
Defendants.

MEMORANDUM OPINION

Defendants have moved for summary judgment in this antitrust action involving the garbage collection franchise for Clark County, Nevada. Pretrial discovery has been extensive and in the context of such thorough preparation, the use of the word "summary" to characterize the motion made is far from apt. All the plaintiff's cards—or at least its aces and kings—are on the table, and the issue presented is whether the proofs adduced, taking them in the light most favorable to plaintiff, support the structure of a cause of action under the Sherman Act sufficient to require submission of the case to a jury for determination.

Plaintiff's proliferation of ideas, contentions, inferences, citations of authority, quotations from cases

and arguments engenders admiration for the industry, imagination and ingenuity of counsel, but it has made it impossible for the Court to separately consider and comment in writing upon each argument made and court decision cited. This surely is not the situation, which so frequently occurs, of casual preparation in the trial court followed by thorough research and scholarly briefs on appeal. If this Court reaches the wrong conclusion, it will not be because it has not been fully informed by counsel.

The "Golden Fleece" of treble damages plus attorneys' fees and costs has led the diligent, aggressive lawyer to adapt the language of monopoly and restraint of trade to all varieties of normal, standard and customary business transactions. While such expertise in legal composition may withstand a motion to dismiss, it does not require or justify judicial submission to the descriptive language of the pleadings when the facts are laid bare. Cf. *Harman v. Valley National Bank of Arizona,* 9th Cir. 1964, 339 F. 2d 564; *SS Logging Co. v. Barker,* 9th Cir. 1966, 366 F. 2d 617. "The use of conventional anti-trust language in drafting a complaint (or, we may add, in arguing a case) will not extend the reach of the Sherman Act to wrongs not germane to that act, even though such wrongs be actionable under state law." *Parmelee Transportation Company v. Keeshin,* 7th Cir. 1961, 292 F. 2d 794.

It must be conceded at the outset that the proofs will support a finding that the defendants—interrelated corporations—their officers and stockholders,

acted in concert among themselves and with others named in the Amended Complaint to bring about a favorable result for the financial profit of defendants, or some of them. In other words, there was a conspiracy or combination, without ascribing to those words the disparaging connotations frequently present. We cannot, however, infer from the facts an unlawful conspiracy—one which is abjured by the Sherman Act as being unlawfully in restraint of trade or toward the attainment of an illegal monopoly.

The object of the conspiracy was to obtain for defendant Clark Sanitation, Inc., an exclusive franchise for the garbage pick-up and disposal service in the unincorporated area of Clark County, Nevada. Before the grant of the exclusive franchise, plaintiff, Sun Valley Disposal Co., Inc., was in open competition with Clark Sanitation, Inc. in the collection of garbage in the unincorporated area. The first step in the campaign was to persuade the Nevada Legislature to enact a statute authorizing Counties to award exclusive franchises for garbage collection and disposal service. Statutes of Nevada, 1960, Chapter 246, p. 433; N.R.S. 244.187. Such legislation is not claimed to be illegal, and the political activity or lobbying which accomplished its passage is protected activity under the antitrust laws. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 1961, 365 U.S. 127. Then defendants worked with or influenced the Clark County Commissioners to implement the statutory authority and to fix terms or conditions of the franchise award which would favor Clark Sanitation,

Inc. The first award of an exclusive franchise to Clark Sanitation, Inc. was set aside by the state court because the publication of the notice to bid was faulty. The second effort to obtain proposals for performance of the County garbage disposal needs resulted in the award of the exclusive franchise to Clark Sanitation, Inc., under which it is presently operating. The validity of this franchise has not been attacked in any action, and it is this exclusive franchise which resulted in the extinction of plaintiff's garbage disposal business in Clark County and eliminated competition in performance of such services.

Plaintiff's incidental claims which find inferential support in the evidence are that the competition between Sun Valley and Clark Sanitation for county garbage disposal customers before the award of the franchise impaired plaintiff's financial position and its ability to earn a profit; that the other defendants assisted Clark Sanitation in this competition in various ways; that one or more of the County Commissioners favored Clark Sanitation for personal selfish reasons unrelated to the public interest; that misrepresentations were made in Clark Sanitation's proposal for the exclusive franchise; and that the procedures adopted for award of the franchise were illegal. The argument, as we understand it, viewing the evidence in the light most favorable to plaintiff, is that the damage was done before the exclusive franchise was awarded and that defendants' concerted activity had placed plaintiff in a position so that plaintiff could not successfully bid for the exclusive franchise against Clark Sanitation.

It, nevertheless, must be recognized that had no exclusive franchise been awarded, plaintiff would still be in open competition with defendants. The argument that the award of the franchise to Clark Sanitation may be viewed as not the essence of the monopolistic conspiracy but as merely an incidental proximate result flowing from the conspiratorial activity, while an interesting exercise in mental gymnastics, does not appeal to common sense. The gravamen of plaintiff's carefully structured case is that the effect of the conspiratorial activity was to place plaintiff in a position so that it could not bid successfully for the franchise, and the ultimate award of the franchise to Clark Sanitation is the very essence of the conspiracy without which monopolistic control of the garbage disposal business in the unincorporated area of Clark County would not have been obtained.

Naming one or more of the Clark County Commissioners as co-conspirators does not, in our opinion, save plaintiff's case. Local governmental units such as city councils and county boards are not and never will be free from personal interest and outside influence. Negotiations with such boards or members thereof regarding ordinances, resolutions, contracts, licenses, permits and the like, we deem to be within the protected or excluded area of activity insofar as the antitrust laws are concerned. Here the state created the machinery for the grant of a monopolistic franchise. *Parker v. Brown*, 1943, 317 U.S. 338. No violation of the Sherman Act can be predicated upon mere attempts to influence the passage or enforcement of laws

or an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly. *Eastern R. Conf. v. Noerr Motors,* 1961, 365 U.S. 127. The point is not that the County Commissioners, acting in an official capacity, may enjoy a personal governmental immunity from liability for any such conspiratorial activity. Rather, it should be emphasized that activity to influence legislative or executive conduct is not the kind of activity which will support a Sherman Act suit. That is not to say that in a different case, evidence of such activity would not be probative on the issues of existence of a conspiracy, intent, motive and the like, but where, as here, the very foundation of the claim is that plaintiff was placed in a position so that it could not successfully compete for the franchise the cause must fail. Cf. *Wiggins Airways, Inc. v. Massachusetts Port Authority,* 1st Cir. 1966, 362 F. 2d 52; *United Mine Workers of America v. Pennington,* 1965, 381 U.S. 657.

We do not understand *Harman v. Valley National Bank,* 9th Cir. 1964, 339 F. 2d 564, and *SS Logging Co. v. Barker,* 9th Cir. 1966, 366 F. 2d 617, upon which plaintiff places strong reliance, to be inconsistent with these conclusions. In the *Harman* case, the Court said:

> "We agree with appellees that Noerr would apply whether or not the proceeding brought by the Attorney General had substantive merit and complied with statutory procedural prerequisites. In either event, appellees' conduct in informing the Attorney General of alleged 'irregularities'

and persuading him to take the action which they desired with respect to enforcement of the Arizona statute would be essentially political in nature, and basically dissimilar from the 'price fixing agreements, boycotts, market-division agreements, and other similar arrangements' normally held violative of the Act. 365 U.S. at 136, 81 S. Ct. at 529. Moreover, to make Sherman Act liability depend upon ultimate resolution of often difficult questions of law and fact relating to the validity or propriety of solicited governmental action 'would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade' (365 U.S. at 137, 81 S. Ct. at 529), and 'would raise important constitutional questions' because of the inevitable burden which such a construction of the Sherman Act would impose upon the right of the people to petition the government for the redress of grievances. 365 U.S. at 138, 81 S. Ct. at 530."

The Court then went on to emphasize that in the Complaint, a larger conspiracy not limited to the alleged improper influencing of governmental action against one financial institution had been charged. In the Barker case, the Court relied upon the principle of governmental immunity to sustain the dismissal of the anti-trust action as against the government officers who were charged as co-conspirators, and said:

> "The allegations of the complaint using the words 'conspired with each other and with the defendants' and 'conspired to and arranged for

> another sale' and a 'conspiracy to injure the plaintiff' do not operate to take this case out of the Gregoire rule."

Judge Merrill dissented from this holding, although concurring in the result. In that case, the rights of the non-official defendants were not before the Court and there was no occasion to consider the impact of the principle of the *Noerr* case upon the transactions alleged.

We cannot disregard the fact that whenever two or more persons, perhaps one of them a public official, confer, negotiate, discuss or transact business for the attainment of a common objective, there is a basis for a charge of conspiracy, confederation or combination. While the principle of official immunity insulates the public officer from personal liability to an injured person for official misconduct, there is no such principle protecting the private citizen who must answer for his conspiratorial wrongdoing. Still a related principle in anti-trust law stemming from a similar root, that is, recognition of the overweening need to permit our democratic institutions to work free from the harassment and impediment of litigous warfare, announces that efforts to persuade the legislative or executive authority to take particular action relevant to a monopolistic objective are not actionable under the Sherman Act. It is submitted that the two principles are related and that the combination of them precludes recognition of an actionable conspiracy which is predicated for its accomplishment upon influence, rightful or wrong-

ful in character, to instigate governmental action and irrespective of whether or not the official is named as a co-conspirator.

A case of this kind should not be viewed in the light of the slogan "every wrong must have a remedy." The problem is not whether plaintiff has a remedy—it is whether defendants' alleged conspiratorial conduct is actionable under the Sherman Act. If the exclusive franchise was lawfully granted to Clark Sanitation, it has a legal monopoly authorized by the State of Nevada under its police power to protect public health and welfare. The Sherman Act does not proscribe concerted activity with the purpose to obtain such a franchise. If the franchise was unlawfully granted, the remedy is to attack the franchise.

Defendants' primary argument in support of a summary judgment is that the proofs do not show that the acts complained of involve interstate commerce or have a substantial and direct effect upon interstate commerce. We think this, too, is well taken. The dispute in this case is limited to the garbage pick-up and disposal service in the unincorporated area of Clark County, Nevada. Nothing could be much more local in character. While interstate commerce, in the acquisition of equipment and supplies for the garbage collector, is incidentally involved, the acts or conduct complained of did not affect the interstate commerce of the garbage collection business. *Page v. Work*, 9th Cir. 1961, 290 F. 2d 323. There is no showing that any line of interstate commerce asso-

ciated with the garbage collection business was substantially or directly affected by any acts or conduct pursuant to the conspiracy to monopolize. Until the exclusive garbage collection franchise was granted, both the competitive businesses, Sun Valley Disposal Co. and Clark Sanitation, Inc., operated unhampered and unimpeded insofar as lines of interstate commerce were concerned.

For the reasons stated, a summary judgment will be entered for defendants. The Answer of defendants includes eight counterclaims. No basis for federal jurisdiction of the counterclaims is alleged, and they must fall with the determination that the Court has no jurisdiction of the principal action.

Dated: February 26, 1968.

Bruce R. Thompson
United States District Judge

Filed February 27, 1968,
Bernard Supera, Clerk.

Appendix B

Case No. A52256

In The Eighth Judicial District Court of the State of Nevada in and for the County of Clark

Sun Valley Disposal Co., Inc., a Nevada corporation, Plaintiff,

vs.

Clark Sanitation, Inc., a Nevada corporation, and Louis F. La Porta, Robert T. Baskin, William H. Briare, Darwin W. Lamb, and James G. Ryan, as the Board of County Commissioners of Clark County, Nevada, Defendants.

COMPLAINT

1. At all times herein material, Sun Valley Disposal Co., Inc., hereinafter called Sun Valley, was a corporation operating under and by virtue of the laws of the State of Nevada. Effective between approximately January 1, 1961 and April 4, 1965, Sun Valley has conducted a garbage pick-up and disposal service in the unincorporated area of Clark County, Nevada. At the present time, Sun Valley's garbage pick-up and disposal service is shut down. Its customers in Clark County have been taken from it by the defendant, Clark Sanitation, Inc., as a result of the commission of unlawful acts, as hereinafter alleged. At all times herein material, R. J. Collet

has owned certain equipment used by Sun Valley exclusively in its garbage pick-up and disposal service. R. J. Collet has duly executed the assignment, copy of which is hereto annexed as Exhibit "A" and incorporated herein by reference.

2. At all times herein material, Clark Sanitation, Inc., hereinafter called Clark Sanitation, was a corporation organized and operating under and by virtue of the laws of the State of Nevada, with its principal place of business in Clark County, Nevada. At all times herein material, Clark Sanitation has conducted a garbage pick-up and disposal service in the unincorporated area of Clark County, Nevada.

3. At all times herein material, Defendants Louis F. La Porta, Robert T. Baskin, William H. Briare, Darwin W. Lamb and James G. Ryan were, and are now, the Board of County Commissioners of the County of Clark, State of Nevada, a political subdivision of the State of Nevada.

4. At all times herein material, Sun Valley had a legal right to exercise the privilege of garbage pick-up and disposal service in the unincorporated area of Clark County, Nevada, in open competition with Clark Sanitation.

5. At all times herein material, Sun Valley had a substantial investment in its aforesaid business, and had paid Clark County, Nevada, business license fees for the right to operate its aforesaid business, as well as substantial personal property taxes upon the equipment used by Sun Valley in said business, which license fees and taxes the Board of County

Commissioners of Clark County, Nevada, at all times received and accepted.

6. On March 5, 1965, Defendants Louis F. La Porta, Robert T. Baskin, William H. Briare, Darwin W. Lamb and James G. Ryan, as the Board of County Commissioners of Clark County, Nevada, awarded to Clark Sanitation a void exclusive franchise for the garbage pick-up and disposal service in the unincorporated area of Clark County, Nevada.

7. The purported exclusive franchise awarded to Clark Sanitation was void for the following reasons:

(a) Defendant Board of County Commissioners adopted procedures for the award of the franchise which failed to comply with the governing statute (NRS 244.187);

(b) The rates to be charged the public were eliminated as a bid variable in advance of the publication of an invitation for bids;

(c) The published bid documents failed to show a common prescribed standard to be used in arriving at the best bid;

(d) The published bid documents contained a multiplicity of bid variables;

(e) The published bid documents instructed prospective bidders to fill in three (3) bid variables on the garbage dump use permit and three (3) bid variables on the franchise for garbage pick-up and added to the instructions: "The Board of Commissioners further reserves the right to consider the bids for the Franchise and the Use Permit either separately or

together when making its determination as to the granting of the Franchise and the Use Permit";

(f) Defendant Board of County Commissioners voted a package deal for both dumpsite and garbage pick-up and disposal under circumstances whereby the bid conditions applicable to the dump use permit prohibited dump charges to be imposed upon the City of Las Vegas franchise holder and about seventy-five (75%) per cent to eighty-five (85%) per cent of the dump business came from the City of Las Vegas franchise holder which was interrelated through officers, directors and stockholders with Clark Sanitation;

(g) One or more of the County Commissioners of Clark County, Nevada, favored Clark Sanitation for personal selfish reasons unrelated to the public interest;

(h) Misrepresentations were made in Clark Sanitation's proposal for the exclusive franchise, to-wit: In response to request that the bidder submit an inventory of "Presently owned or leased equipment," Clark Sanitation listed "Inventory of Rolling Stock Owned, Operated and/or Leased by Clark Sanitation, Inc., February 1965" as $327,010.96, well knowing that the inventoried equipment was pooled among Clark Sanitation and other interrelated corporations conducting garbage pick-up and disposal service outside of the unincorporated area of Clark County, Nevada; that from time to time it was necessary to use a piece of equipment owned by an interrelated corporation for a portion of time in an area that was not serviced by the corporation which owned

the equipment; that intercompany use resulted in Clark Sanitation using another corporation's equipment 8½ percent of the time; that only particular trucks were assigned to Clark Sanitation's routes; that only 25 percent of the capacity of the trucks listed were used by Clark Sanitation in the unincorporated area of Clark County, Nevada;

(i) Defendant Board of County Commissioners, by its aforesaid procedures denied Sun Valley due process of law, in violation of Sun Valley's rights under the Constitution of Nevada and the due process of law clause of the Fourteenth Amendment to the United States Constitution.

8. Clark Sanitation has, subsequent to the aforesaid award of the void exclusive franchise, used the void exclusive franchise fraudulently obtained, as hereinbefore alleged for the purpose of excluding competition by Sun Valley in garbage pick-up and disposal service in the unincorporated area of Clark County, Nevada.

9. As a proximate result of the acts committed, as hereinbefore alleged, Sun Valley has suffered destruction of its good will in the value of $457,950.00 and R. J. Collet has suffered damage in the loss of value of trucks, equipment and containers in the amount of $38,183.49.

10. On or about April 4, 1963, a final judgment was duly entered by the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, in Case No. 111634, entitled Sun Valley Disposal Co., Inc., a Nevada corporation, Plaintiff,

vs. Harley Harmon, Robert Baskin, Arthur Olson, Norman White and Louis La Porta, as the Board of County Commissioners of Clark County, Nevada, and Clark Sanitation, Inc., a Nevada corporation. Plaintiff intends to rely upon the findings of fact in said prior proceeding essential to said judgment as conclusive between the parties to this action

Wherefore, Plaintiff, Sun Valley Disposal Co., Inc., a corporation, prays for judgment as follows:

1. Declaring null and void the purported award by the Defendant Board of County Commissioners of Clark County, Nevada, of an exclusive franchise for garbage pick-up and disposal service in the unincorporated area of Clark County, Nevada;

2. Awarding in favor of Sun Valley Disposal Co., Inc., a corporation, and against Defendant Clark Sanitation, Inc., the sum of $496,133.49 damages and costs.

Morton Galane
Attorney for Plaintiff
1100 First National Bank Building
Las Vegas, Nevada

DEMAND FOR TRIAL BY JURY

The Plaintiff, Sun Valley Disposal Co., Inc., hereby makes demand for a trial by jury of all issues so triable.

Morton Galane
Attorney for Plaintiff
1100 First National Bank Building
Las Vegas, Nevada

ASSIGNMENT

For valuable consideration, the undersigned hereby gives, grants, bargains, sells, assigns, transfers and sets over the full, free, and unencumbered right, title and interest, to Sun Valley Disposal Co., Inc., a Nevada corporation, and its assigns, to its own proper use and benefit, any and all sum or sums of money now due or owing undersigned, and all claims, demands, and cause or causes of action of whatever kind and nature, which undersigned have had, or now have, or may have against:

Clark Sanitation, Inc., a Nevada corporation, and Robert T. Baskin, William H. Briare, Darwin W. Lamb, and James G. Ryan, as the Board of County Commissioners of Clark County, Nevada,

or any other person or persons, and each and either of them, whether jointly or severally arising out of, or for any other loss, injury, or damage by undersigned sustained, or cause or causes of action arising, growing out of, or relating to or connected with the property, tangible and intangible, owned by R. J. Collet and used by Sun Valley Disposal Co., Inc. in the garbage collection and disposal service conducted by Sun Valley Co., Inc. or used for bidding for governmental contracts, licenses or franchises by R. J. Collet and Sun Valley Disposal Co., Inc.

And I hereby constitute and appoint the said Sun Valley Disposal Co., Inc. and its assigns, the undersigned's true and lawful attorney and attorneys, irrevocable, with full power of substitution and revocation for me and in my name, or otherwise, but

for the sole use and benefit of the said Sun Valley Disposal Co., Inc., and its assigns, to ask, demand, sue for, collect, receive, compound, and give acquittances for the said claim or claims, or any part thereof.

In witness whereof, the undersigned has signed his name on the date appearing opposite his name.
March 4, 1968. R. J. Collet

State of Nevada
County of Clark—ss.

On the 4th day of March, 1968, before me, the undersigned, a Notary Public in and for the County of Clark, personally appeared R. J. Collet, known to me to be the person whose name is subscribed to the within document and acknowledged that he executed the same.

Witness my hand and official seal.
(Seal)

Margaret Maclary
Notary Public in and for the said
County and State

Appendix C

APPELLEES' RESPONSES TO APPELLANT'S SPECIFICATIONS OF ERROR

Appellant's Assignment of Error	Appellees' Responsive Argument	Page in Appellees' Brief
No. 1	Argument B-1, B-2(a)	
No. 2	Argument B-1, B-2(b)	
No. 3	Argument B-1, B-2(a)	
No. 4	Argument A-2, A-3	
No. 5	Argument A-2, A-3	
No. 6	Argument A-1, C	
No. 7	Argument A-1, C	
No. 8	Argument A-2, A-3	

Appellees' motion for summary judgment was made and granted on two grounds: governmental immunity and interstate commerce. Appellant with its usual aptitude for fragmentation has broken the findings into eight specifications of error.

The first three specifications of error relate to the interstate commerce issue. Appellant claims Appellees engaged in interstate commerce through container leasing (Specification No. 1), garbage collection in another state (Specification No. 2), and purchases from an out-of-state supplier (Specification No. 3). Specification No. 1 and No. 3 are dealt with under Argument B-1 and B-2(a). Specification No. 2 is answered in Argument B-1 and B-2(b).

Specifications of error Nos. 4 through 8 relate to the governmental immunity issue. Specification Nos. 4, 5 and 8 relate to the activities of Appellees and the

Board of County Commissioners in seeking and granting the exclusive franchise. Specification Nos. 6 and 7 relate to attacks on the validity of the franchise. Specifications of error Nos. 4, 5 and 8 are answered in Argument A-2 and A-3; Specification Nos. 6 and 7 in Argument A-1 and C.